IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

MADELEINE ENTINE,	:	
	:	
Plaintiff,	:	**Case No. 2:17-cv-946**
	:	
v.	:	**JUDGE MARBLEY**
	:	
SCOTT LISSNER,	:	**Magistrate Judge Jolson**
	:	
Defendant.	:	

DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER

Respectfully submitted,

MICHAEL DEWINE (0009181)
Ohio Attorney General

s/ James D. Miller

JAMES D. MILLER (0080357)
Trial Counsel
JEFFREY A. KNIGHT (0086649)
Co-Counsel
Assistant Attorneys General
Education Section
30 East Broad Street, 16th Floor
Columbus, Ohio 43215
Telephone: (614) 644-7250
Facsimile: (614) 644-7634
james.miller@ohioattorneygeneral.gov
jeffrey.knight@ohioattorneygeneral.gov

Counsel for Defendant

I. INTRODUCTION

Defendant Scott Lissner ("Mr. Lissner"), ADA Coordinator and Section 504 Compliance Officer at The Ohio State University ("OSU"), submits this preliminary Opposition to Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction (Doc. 2). Mr. Lissner reserves the right to supplement this opposition pursuant to any scheduling order of this Court at or subsequent to the Local Rule 65.1 status conference scheduled for October 27, 2017, at 11:30am. Plaintiff Madeleine Entine ("Plaintiff") seeks to enjoin Mr. Lissner, in his official capacity as an employee of OSU, from carrying out his obligations under federal and state law, as well as applicable university policy, as they relate to accommodating two OSU students who have disabilities. Accordingly, while this lawsuit is styled as an injunction action against Mr. Lissner, it is, in fact an action against OSU.

At the outset, it is important to underscore that this matter involves *two* OSU students with disabilities. Missing from Plaintiff's allegation that OSU has forced her into a prohibited ultimatum – having to choose between her assistance animal and living in her sorority house – is an appropriate discussion of the *other* OSU student, who also has a disability and whose disability is exacerbated by the presence of Plaintiff's dog.

The conflict itself is rather straightforward: Plaintiff and her housemate have been offered reasonable accommodations that are incompatible. As a result, Mr. Lissner evaluated both students, their respective disabilities and accompanying documentation, and attempted to craft a solution that would allow both students the ability to remain in the sorority house. However, after completing the interactive process with both students, Mr. Lissner determined that co-habitation was unworkable due to the nature of the students' disabilities and the physical space and structure of the house. Mr. Lissner chose not to weigh the disabilities, but instead to find a neutral, non-discriminatory method to resolve the conflict. Mr. Lissner requested copies of the students' leases and determined that the student who signed her lease second in time – here, Plaintiff – had the opportunity to either forgo her assistance animal, or relocate to other student housing. Plaintiff chose a third option and rebuked Mr. Lissner's process as well as his repeated requests to follow basic guidelines with respect to her dog and the other student's disability.

As explained more fully below, Plaintiff does not present clear and convincing evidence warranting the extraordinary remedy of a temporary restraining order. For the reasons that follow, Plaintiff's motion should be denied.

II. FACTS

It bears repeating that Plaintiff's characterization of Mr. Lissner's role in "refus[ing] to allow Ms. Entine's service animal in the house" confuses what actually occurred. Mr. Lissner gave Plaintiff, who signed her lease second in time to her housemate with disability symptoms resulting from and exacerbated by Plaintiff's animal, the option of either forgoing her accommodation, or receiving assistance from OSU to locate other student housing where her animal's presence would not cause harm to another based on her disability. The determining factor– who signed the lease later in time – is reasonable as it is not based on disability (or any other protected class).

Plaintiff alleges that if she "does not give up her service animal, The Ohio State University is kicking her out of her house in four days." (Doc. 2; PAGEID #:41). Plaintiff overstates OSU's decision. As evidenced by Plaintiff's own Exhibit B attached to her Complaint, OSU became aware through the investigation and inquiry of Mr. Lissner that both

Plaintiff and her roommate had "medical conditions that rise to the level of disability that cannot be accommodated in the same house." (Doc. 1-2; PAGEID #:16).

The Chi Omega house certified Plaintiff's animal as an emotional support animal as an accommodation to Plaintiff in early September 2017. (Doc. 1-5; PAGEID #: 33). Following this process, Mr. Lissner was asked to assist when a fellow resident of the house raised medical issues related to the animal's presence. (*Id*.). Pursuant to OSU policy, Mr. Lissner conducted an inquiry including reviewing medical documentation of Plaintiff and her housemate interviewing both students, and walking through the residence to determine if accommodations could be made in the same living environment. (*Id*. at PAGEID #:34).

The medical condition suffered by Plaintiff's housemate are significant and clearly rise to the level of a disability. Plaintiff's roommate is diagnosed with Crohn's disease, an autoimmune disorder, affecting her gastroenterological bodily mechanisms, including her immune, digestive, and bowel functions. (Exhibit A – Palleja Letter, attached). She also has allergic asthma, and is specifically allergic to dogs – with recent blood draw results showing an abnormal amount of dog dander in her system. (Exhibit B – Blood Draw, attached). These conditions clearly meet the definition of a disability under the federal law. *See* 42 U.S.C. §§ 12102(1)(A), *et. seq*. When her allergic symptoms react to dog dander, the interaction aggravates the symptoms of her Crohn's disease based on her suppressed immune function. These are not mere allergies; her allergic asthma interacts with her Crohn's disease to create negative medical affects limiting her ability to participate in her educational activities.

As Mr. Lissner determined after his thorough inquiry that both students' disabilities could not be accommodated in the Chi Omega house due to the physical space and mechanical systems in the house, OSU used a neutral, non-discriminatory factor to resolve the competing disability accommodations: the date each student signed the lease. (Doc. 1-5; PAGEID #: 34). Because Plaintiff was second in time to sign her lease, she was given the option to forgo her accommodation or receive assistance from OSU in finding alternate housing with her accommodation. (*Id*. at PAGEID #:34-35).

Plaintiff refused OSU's offer of housing assistance and instead filed this lawsuit asking the Court to substitute its judgment on this matter of student housing for that of OSU.

III. LEGAL ARGUMENT

A. Plaintiff Is Not Entitled To A Temporary Restraining Order

"Injunctive relief is an extraordinary remedy and is issued cautiously and sparingly." *TOA Techs., Inc. v. Guzzetti*, No. 1:12CV667, 2012 WL 1096114, at *2 (N.D. Ohio Mar. 29, 2012) (citation omitted). To evaluate a claim for injunctive relief, Courts consider whether: (1) the movant has a strong likelihood of success on the merits; (2) the movant would suffer irreparable injury absent the injunction; (3) issuance of a preliminary injunction would cause substantial harm to others; and (4) the public interest would be served by issuance of a preliminary injunction. *See Leary v. Daeschner,* 228 F.3d 729, 736 (6th Cir. 2000).

The movant also bears the burden of establishing her claim to a preliminary injunction, which "should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it." *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 573 (6th Cir. 2002). The proof required to obtain an injunction is "much more stringent than the proof required to survive a summary judgment motion." *Leary*, 228 F.3d at 739. The party seeking a preliminary injunction must establish its case by clear and convincing evidence. *Damon's Rests., Inc. v. Eileen K Inc.*, 461 F. Supp.2d 607, 621 (S.D. Ohio Nov. 13, 2006). To meet its burden, the movant's evidence "must more than outweigh the [opposing] evidence," but must also "persuade the court that its claims are highly probable." *Id*.

Here, the request for emergency injunction must be considered in the context of the university environment. Universities must be able to administer housing standards and decisions if they are to provide environments that facilitate learning. Enjoining a university from administering its housing policy that tracks federal anti-discrimination laws and regulations would greatly undermine the university's ability to provide an appropriate learning environment for all its students.

B. Plaintiff Has Not Demonstrated Likely Success On the Merits of Her Federal Statutory Claims

Plaintiff is not likely to succeed on any of her federal statutory claims, because all of Mr. Lissner's actions satisfied the requirements of the ADA, the Fair Housing Act, and Section 504 of the Rehabilitation Act.

Plaintiff alleges that Mr. Lissner, in his official capacity at OSU, has "denied" Plaintiff her accommodation – whether such accommodation included a service animal or an emotional support animal – in violation of various federal disability statutes. She is incorrect.

Mr. Lissner has not denied Plaintiff the accommodation of her assistance animal. Mr. Lissner conducted an inquiry when a fellow student living with Plaintiff brought forth complaints that the presence of the dog exacerbated significant, disabling medical conditions – allergies and Crohn's disease – caused by and/or exacerbated by exposure to Plaintiff's animal in the residence. Contrary to Plaintiff's position, Mr. Lissner did not determine for these purposes that the housemate suffered from mere allergies; rather, Mr. Lissner determined that the housemate's documented Crohn's disease and the interaction between the Crohn's disease and her allergies to dogs created a disabling condition that required accommodation. Because each student was diagnosed with a disability, and each had accommodations related to that disability, Mr. Lissner attempted to work with the students to arrive at an amenable solution that respected both students' accommodations while also protecting both students' rights under the various federal anti-discrimination statutes. However, based on the nature of the disabilities and the physical space of the house, it was not possible to find a long-term solution that provided both students their accommodations and respected their disability rights in the particular house at issue.

OSU may not pick and choose which disability is more severe or which student's rights are more important than the other's – that in and of itself would be tantamount to discrimination on the basis of disability. Instead, Mr. Lissner used a method that disregarded disability and sounded in logic: the student who signed the lease second in time would be given the option to remain in the house without the accommodation *or* receive assistance from OSU in securing alternate housing with the accommodation. Neither Mr. Lissner nor OSU ever denied or removed Plaintiff's accommodation. As a simple matter of chronology, Plaintiff was second in time to secure her housing, so the choice was provided to her. She chose to file this lawsuit.

Because OSU never denied Plaintiff housing or any accommodation on the basis of her disability, Plaintiff is not likely to succeed on the merits of any claim under any federal statute set forth in her motion, and it should be denied.

C. Plaintiff Has Not Demonstrated That She Will Suffer Irreparable Injury Absent The Temporary Restraining Order

Plaintiff claims that the imminent, irreparable harm she faces is presumed because she has shown a likelihood of success on the merits of her federal statutory claims. As argued above, she has not, so this argument fails.

However, even if she argued that she faces irreparable harm based on OSU's administrative housing determination that she is entitled to assistance from OSU in securing alternate housing where her accommodation will not infringe on the rights of another student, such an argument would still fall flat. OSU is not "denying" Plaintiff an accommodation, nor is OSU "denying" Plaintiff housing. The circumstances, upon due consideration and attempted resolution by Mr. Lissner, simply do not allow both students' and their disabilities to be accommodated in the particular house at issue. Plaintiff fails to acknowledge that OSU has made it abundantly clear that it will help facilitate her securing alternate housing upon her request. She declined that offer, and continues to decline it.

Accordingly, Plaintiff has not shown that she will face immediate, irreparable harm if the restraining order is not granted, thus it should be denied.

D. Issuance Of The Temporary Restraining Order Would Cause Substantial Harm To Others

Strikingly absent from Plaintiff's motion is the effect that granting the injunctive relief would have on third parties – specifically the student living in the house whose disability symptoms are highly exacerbated and aggravated by Plaintiff's animal. Enjoining OSU from administering its housing and making alternate arrangements based on the unique facts here and the consideration of *all* students' disabilities would unjustly diminish OSU's ability to ensure that all its students receive housing in an appropriate, safe manner free from discrimination.

The exhibits speak plainly to the effect of Plaintiff's animal on her housemate OSU cannot decide whose disability is "worse" or "more deserving" of accommodation; hence, the disability-neutral factor of which student signed the lease first controls under OSU policy. Should this Court grant the restraining order and enjoin OSU from arranging its student housing in a manner to respect all students' disabilities, third parties – and specifically the student suffering due to the animal's presence – will suffer unjustifiable harm.

E. The Public Interest Would Not Be Served By Issuance Of A Temporary Restraining Order

Plaintiff besmirches her housemate's disability and claims that under the ADA, mere allergies do not permit denial of a service animal, and therefore the public interest is served by enforcing anti-discrimination statutes. OSU policy tracks all anti-discrimination policies, including housing and disability. However, Plaintiff argues that her housemate's mere allergy to dogs is not enough to prevent the dog from being present in the house under the ADA. This argument misses the mark. As described above, the affected roommate does not suffer mere allergies, but rather a panoply of symptoms from allergies interacting with Crohn's disease.

Plaintiff's legal arguments which cite the DOJ analysis miss the point. OSU did not determine that Plaintiff's housemate suffers mere allergies; rather, based on a review of all her medical documentation, it was determined that she suffered from a condition that substantially limits a major life activity, including but not limited to major bodily functions, such as the immune system, respiratory function, digestive function, and bowel function – and thus has a bona fide, recognized disability under federal law. *See* 42 U.S.C. §§ 12102(1)(A), 12102(2)(B) (federal definition of disability, including limiting or impairing major life activities, including the major bodily functions listed above). OSU cannot judge which disability overrides the other. The public interest would not allow such a choice either. The public is served by OSU respecting *all* students' disability rights and resolving disputes with non-discriminatory factors: such as date of lease signing.

Granting a temporary restraining order under these circumstances would not serve the public interest, as it would force OSU to use impermissible disability-related factors to make housing decisions, which is against OSU policy and federal statutes and regulations.

IV. CONCLUSION

Plaintiff has failed to meet her burden and establish that she is entitled to a temporary restraining order. For all of the foregoing reasons, Plaintiff's motion should be denied.

Respectfully submitted,

MICHAEL DEWINE (0009181)
Ohio Attorney General

s/ James D. Miller

JAMES D. MILLER (0080357)
Trial Counsel
JEFFREY A. KNIGHT (0086649)
Co-Counsel
Assistant Attorneys General
Education Section
30 East Broad Street, 16th Floor
Columbus, Ohio 43215
Telephone: (614) 644-7250
Facsimile: (614) 644-7634
james.miller@ohioattorneygeneral.gov
jeffrey.knight@ohioattorneygeneral.gov

Counsel for Defendant

CERTIFICATE OF SERVICE

This certifies that the foregoing was filed electronically on October 27, 2017. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

s/ James D. Miller

JAMES D. MILLER (0080357)
Assistant Attorney General